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UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In re:

FAIRPOINT COMMUNICATIONS, INC.,  
*et al.*,

Case No. 09-16335 (BRL)  
Chapter 11  
(Jointly Administered)

Debtors.

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**MOTION OF QWEST CORPORATION AND QWEST COMMUNICATIONS  
COMPANY, LLC, FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE  
EXPENSE CLAIM PURSUANT TO 11 U.S.C. § 503(b)(1)(A)**

Qwest Corporation (“QC”) and Qwest Communications Company, LLC (“QCC”) move this Honorable Court for an order allowing, and directing the above-captioned debtors (the “Debtors”) to pay, an administrative expense claim pursuant to 11 U.S.C. § 503(b)(1)(A) (the “Request”) and, in support thereof, state as follows:

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. The statutory basis for relief sought herein is 11 U.S.C. § 503(b)(1)(A). Venue is appropriate in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

## II. FACTUAL BACKGROUND

2. On October 26, 2009 (the “Petition Date”), FairPoint Communications, Inc. and certain of its affiliates (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of the 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

### A. The Agreements

3. Prior to the Petition Date, several of the Debtors entered into the following agreements (the “Agreements”) with QC and QCC:

| Debtor party                                   | Counterparty  | Agreement                                |
|--|---|--|
| FairPoint Communications, Inc.                 | QCC   | Confidential Settlement Agreement        |
| Fairpoint Communications, Inc.                 | QCC   | Wholesale Services Agreement             |
| Northern New England Telephone Operations, LLC | QCC   | Master Services Agreement                |
| Telephone Operating Company of Vermont, LLC    | QCC   | Master Services Agreement                |
| Northern New England Telephone Operations, LLC | QCC, as successor in interest to OnFiber Carrier Services, Inc. | Interconnection Agreement                |
| Northern New England Telephone Operations, LLC | QCC, as successor in interest to OnFiber Carrier Services, Inc. | Interconnection Agreement                |
| Northern New England Telephone Operations, LLC | QCC   | Commitment Discount Plan                 |
| Telephone Operating Company of Vermont, LLC    | QCC   | Commitment Discount Plan                 |
| Ellensburg Telephone Company                   | QC  | Fiber Lease Agreement                    |
| Ellensburg Telephone Company                   | QC  | Fiber Lease Agreement                    |
| Fretel Communications, LLC                     | QC  | Interconnection Agreement (non-wireless) |

In addition, *also included among* the Agreements between QC and the Debtors are services provided pursuant to certain tariffs (the “Tariffs”).

4. Pursuant to the Agreements, QC and QCC sold certain services to, and purchased certain services from, the Debtors.

**B. The Plan**

5. On January 13, 2011, the Debtors filed the Debtors' Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Plan") (Docket No. 2115).

**1. Assumption of the Agreements.**

6. The Plan provides that:

Pursuant to sections 365(a) and 1123(b)(2) of the Bankruptcy Code, *all executory contracts and unexpired leases that exist between FairPoint<sup>1</sup> and any Person shall be deemed assumed by FairPoint as of the Effective Date*, except for any executory contract or unexpired lease (a) that has been assumed or rejected pursuant to an order of the Bankruptcy Court entered prior to the Effective Date, (b) as to which a motion for approval of the assumption or rejection of such executory contract or unexpired lease has been filed and served prior to the Effective Date, or (c) that is specifically designated as a contract or lease to be rejected on Schedules 11.1(A) (executory contracts) or 11.1(B) (unexpired leases), which schedules shall be contained in the Plan Supplement.

See Plan at § 11.1, p. 56 (emphasis added).

7. The Agreements were not assumed or rejected pursuant to an order of the Bankruptcy Court entered prior to the Effective Date nor listed in a motion for approval of such assumption or rejection filed and served prior to the Effective Date. The Agreements also were not listed in the Debtors' schedules of rejected executory contracts and unexpired leases. See Docket Nos. 1098, 1404, 1551 and 1761. Accordingly, under the Plan, the Agreements were assumed by the Debtors as of the Effective Date. See Plan at § 11.1, p. 56.<sup>2</sup>

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<sup>1</sup> Capitalized terms used herein but not defined shall have the meaning ascribed to them in the Plan.

<sup>2</sup> Like the other Agreements, the Tariffs were not assumed or rejected pursuant to an order of the Bankruptcy Court entered prior to the Effective Date; nor were they listed in a motion for approval of such assumption or rejection filed and served prior to the Effective Date; nor were they listed in the Debtors' schedules of rejected executory contracts and unexpired leases. See Docket Nos. 1098, 1404, 1551 and 1761. Accordingly, under the Plan, the Tariffs were assumed by the Debtors as of the Effective Date. See Plan at § 11.1, p. 56.

## **2. Resolution of Cure Payments.**

8. The Plan further provides that:

In the event of a dispute regarding . . . the amount of any payments to cure . . . a default [under an assumed contract] . . . or . . . any other matter pertaining to assumption, the Cure payments required by section 365(b)(1) of the Bankruptcy Code shall be made following the entry of a Final Order or orders resolving the dispute and approving the assumption, unless otherwise agreed between FairPoint or Reorganized FairPoint, as the case may be, and the counter party to such executory contract or unexpired lease. If any objection to Cure is sustained by the Bankruptcy Court, FairPoint, at its sole option, may elect to reject such executory contract or unexpired lease in lieu of assuming it.

See Plan at § 11.3.3(ii), p. 48.

### **C. The Cure Objection**

9. On April 30, 2010, QC and QCC filed the Objection of Qwest Corporation and Qwest Communications [Company], LLC to Notice of Proposed Assumption and Cure Amounts, If Any, to be Paid in Accordance With Section 11.3 of the Plan of Reorganization (the “Cure Objection”) (Docket No. 1236). In the Cure Objection, QC and QCC sought this Court’s entry of an order, *inter alia*, (i) requiring the Debtors to pay \$985,413.40 to cure certain defaults under the Agreements as of March 1, 2010, plus all other unpaid amounts that accrue prior to the effective date of assumption, and (ii) requiring the Debtors to continue to pay all amounts under the Agreements as they fall due after assumption of the Agreements. See Cure Objection at p. 8.

10. Pursuant to Section 11.3.3 of the Plan, QC and QCC worked, and continue to work, to resolve amicably the cure-related issues raised in the Cure Objection with, first, the Debtors, and following confirmation of the Plan, the reorganized debtors (the “Reorganized Debtors”). See Plan at § 11.3.3(ii), p. 48.

**D. Confirmation of the Plan**

11. The Plan was confirmed on January 13, 2011. See Order Confirming Debtors' Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Dated As Of December 29, 2010 (the "Confirmation Order") (Docket No. 2113) at ¶ 1, p. 4; see also Confirmation Order at § 40, pp. 20-21 (ordering the provisions of Section 11.1 of the Plan).

12. The Effective Date of the Plan occurred on January 24, 2011. See Notice of Occurrence of Effective Date of Debtors' Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Docket No. 2149) at p. 2.

**III. RELIEF REQUESTED**

13. The Debtors provided certain telecommunications services to QCC. In addition to other amounts paid by QCC to the Debtors for such services between the Petition Date and the Effective Date, QCC paid but disputed \$39,858.83 in billings for such services. By this Request, QC and QCC seek the entry of an order granting them an allowed administrative expense claim in the amount of \$39,858.83 for such overpayments, plus additional amounts to QC and QCC as set forth below, which amounts constitute "actual, necessary costs and expenses of preserving the estate" pursuant to 11 U.S.C. § 503(b)(1)(A).

**IV. BASIS FOR RELIEF REQUESTED**

**A. Postpetition Services Under the Agreements**

14. Section 503(b)(1)(A) of the Bankruptcy Code provides, in relevant part, that a claimant is entitled to an administrative claim for "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A); see also In re Ames Dept. Stores, 582 F.3d 422, 431 (2d Cir. 2009) ("[T]he Bankruptcy Code gives a higher priority to requests for

administrative expenses than to prepetition claims in order to encourage third parties to supply goods and services on credit to the estate, to the benefit of all of the estate's creditors.”).

15. The Debtors provided certain telecommunications services to QCC. In addition to other amounts paid by QCC to the Debtors for such services between the Petition Date and the Effective Date, QCC paid but disputed \$39,858.83 in billings for such services. As a result of these overpayments, QCC is entitled to \$39,858.83 as an administrative expense claim. A list of QCC's overpayments to the Debtors between the Petition Date and the Effective Date is attached as Exhibit A.

16. The \$39,858.83 due to QCC constitutes an “actual, necessary cost and expense of preserving the estate” pursuant to 11 U.S.C. § 503(b)(1)(A).<sup>3</sup> See Amalgamated Ins. Fund v. William B. Kessler, Inc., 55 B.R. 735, 739 (S.D.N.Y. 1985) (“In a Chapter 11 proceeding, where the debtor remains in business, administrative expenses include the costs of carrying on the debtor's business after the commencement of the proceeding.”).

#### **B. The Cure Objection**

17. As set forth above, QC and QCC have been working with the Debtors and the Reorganized Debtors to resolve amicably the issues raised in the Cure Objection.

18. “Courts have held that a right to immediate cure, such as that provided for in § 365, gives rise to a priority administrative expense under § 507(a)(2).” In re Wingspread Corp., 145 B.R. 784, 787 (S.D.N.Y. 1992). Accordingly, to the extent the Plan purports to bar

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<sup>3</sup> In addition to the amounts overpaid by QCC to the Debtors, QCC also disputed \$17,582.30 in billings by the Debtors to QCC between the Petition Date and the Effective Date which were not paid by QCC. Such amount is summarized in Exhibit B. QCC reserves any and all rights, remedies and defenses with respect to such disputes and with respect to any similar prepetition disputes set forth in its Proof of Claim.

QC and QCC from asserting the cure payments set forth in the Cure Objection,<sup>4</sup> and as QC and QCC work with the Reorganized Debtors to resolve the Cure payments due under the Agreements pursuant to Section 11.3.3(ii) of the Plan, QC and QCC reserve any and all claims, rights, remedies and defenses and expressly assert their entitlement to: (i) \$985,413.40 to cure certain defaults under the Agreements as of March 1, 2010; (ii) all other unpaid amounts accrued and/or due prior to and on the effective date of assumption, and (iii) all amounts accrued and/or due under the Agreements after assumption of the Agreements.

WHEREFORE, QC and QCC respectfully request that this Court enter an order (i) granting QCC an allowed administrative expense claim in the amount of \$39,858.83, plus, pursuant to the Cure Objection, any additional amount due as a cure payment as the result of the assumption of the Agreements; (ii) directing the Reorganized Debtors immediately to pay such allowed administrative expense claim; and (iii) granting such other relief to QC and QCC as is appropriate.

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<sup>4</sup> See Plan at § 3.1, p. 18 (“[I]f any Administrative Expense Claim, including an ordinary course expense, is not billed or a request for payment is not made within sixty (60) days after the Effective Date, claims for payment of such Administrative Expense Claims shall be barred.”).

Dated: March 24, 2011

Respectfully submitted,

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Counsel for Qwest Corporation and Qwest  
Communications Company, LLC



UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In re:

FAIRPOINT COMMUNICATIONS, INC.,  
*et al.*,

Case No. 09-16335 (BRL)  
Chapter 11  
(Jointly Administered)

Debtors.

-----X

**ORDER GRANTING MOTION OF QWEST CORPORATION AND QWEST  
COMMUNICATIONS COMPANY, LLC, FOR ALLOWANCE AND PAYMENT OF  
ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO 11 U.S.C. § 503(b)(1)(A)**

Upon consideration of the Motion of Qwest Corporation (“QC”) and Qwest Communications Company, LLC (“QCC”), for Allowance and Payment of Administrative Expense Claim Pursuant to 11 U.S.C. § 503(b)(1)(A) (the “Motion”), and after notice and an opportunity for a hearing pursuant to 11 U.S.C. § 102(1), for the reasons set forth in the Motion, it is hereby

ORDERED THAT, the Motion is granted;

ORDERED THAT, pursuant to 11 U.S.C. § 503(b)(1)(A), QCC has an allowed administrative expense claim in the amount of \$39,858.83; and, pursuant to the Cure Objection,<sup>1</sup> QC and QCC have an allowed administrative expense claim for any additional cure amount due as the result of the assumption of the Agreements; and it is further

ORDERED THAT, the Debtors shall pay such administrative expense claim within three (3) days after this Order is entered on the docket.

Dated: \_\_\_\_\_, 2011

\_\_\_\_\_  
HONORABLE BURTON R. LIFLAND  
UNITED STATES BANKRUPTCY JUDGE

\_\_\_\_\_  
<sup>1</sup> Capitalized terms used herein but not defined shall have the meaning ascribed to them in the Motion.

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UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In re:

FAIRPOINT COMMUNICATIONS, INC.,  
*et al.*,

Case No. 09-16335 (BRL)  
Chapter 11  
(Jointly Administered)

Debtors.

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**CERTIFICATE OF SERVICE**

I, Nicole K. O'Sullivan, Esq., here certify that on this 24<sup>th</sup> day of March, 2011, a true and correct copy of the MOTION OF QWEST CORPORATION AND QWEST COMMUNICATIONS COMPANY, LLC, FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO 11 U.S.C. § 503(b)(1)(A) was served upon the addressees listed on the attached service list in the manners indicated.

By: Nicole K. O'Sullivan  
Nicole K. O'Sullivan

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